**IN THE COURT OF APPEALS OF TENNESSEE**
**AT NASHVILLE**

**THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,**
**Plaintiffs-Appellees,**

**v.**

**TENNESSEE DEPARTMENT OF EDUCATION, et al.,**
**Defendants-Appellants,**

**NATU BAH, et al.,**
**Intervenor-Defendants.**

**ON APPLICATION FOR PERMISSION TO APPEAL UNDER TENN. R. APP. P. 9 FROM THE ORDER OF THE DAVIDSON COUNTY CHANCERY COURT**

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# INTERVENOR-DEFENDANTS BAH, DIALLO, BRUMFIELD, AND DAVIS'S APPLICATION FOR PERMISSION TO APPEAL

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**BEACON CENTER OF TENNESSEE**

Braden H. Boucek (BPR No. 021399)
P.O. Box 198646
Nashville, TN 37219
Tel: (615) 383-6431
Email: braden@beacontn.org

*Attorney for Bria Davis / Star Brumfield*

Jason I. Coleman (BPR No. 031434)
7808 Oakfield Grove
Brentwood, TN 37027
Tel: (615) 721-2555
Email: jicoleman84@gmail.com

*Local Counsel for Natu Bah / Builguissa Diallo*

**INSTITUTE FOR JUSTICE**

Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Email: apanju@ij.org

David Hodges* (D.C. Bar No. 1025319)
Keith Neely* (D.C. Bar No. 888273735)
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Email: dhodges@ij.org
Email: kneely@ij.org

Tim Keller* (AZ Bar No. 019844)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Email: tkeller@ij.org

**Pro hac vice* motions to be filed
*Attorneys for Natu Bah / Builguissa Diallo*



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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .......... 4
QUESTION PRESENTED FOR REVIEW .......... 5
STATEMENT OF FACTS .......... 6
ARGUMENT .......... 8
A. The Court should allow for an immediate interlocutory appeal to prevent Parents from suffering irreparable injuries. .......... 9
B. Prompt resolution of the Home Rule claim could result in less future litigation on a legal issue of great public importance. .......... 12
CONCLUSION .......... 13



Document received by the TN Court of Appeals.

## TABLE OF AUTHORITIES


<u>Cases</u>

*State v. Gilley*,

173 S.W.3d 1 (Tenn. 2005) .......... 12

<u>Rules</u>

Tennessee Rule of Civil Procedure 12.03 .......... 7

Tennessee Rule of Appellate Procedure 7a .......... 9

Tennessee Rule of Appellate Procedure 9 .......... 8

<u>Statutes</u>

Tenn. Code Ann. § 16-3-201 .......... 12

Tenn. Code Ann. § 49-1-103(2) .......... 6

Tenn. Code Ann. § 49-6-2611(a)(1) .......... 6, 10

Tenn. Code Ann. §§ 49-6-2601–2612 .......... 5

<u>Other Authorities</u>

A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., https://reportcard.tnk12.gov/districts/792/schools/2740/page/School Achievement .......... 7




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## QUESTION PRESENTED FOR REVIEW

Plaintiffs, two county governments and a local board of education, sued the Tennessee Department of Education and a host of state officials (the “State-Defendants”), alleging that the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601–2612 (“ESA Pilot Program” or “Pilot Program”) is unconstitutional. (Appendix, Exhibit 1, Metro Compl.) The ESA Pilot Program offers low- and middle-income parents in three underperforming school districts the opportunity to send their children to a private school that better fits their needs. Because the Pilot Program provides benefits to residents assigned only to these three school districts, Plaintiffs allege that it violates article XI, section 9 of the Tennessee Constitution (the “Home Rule Amendment”). (*Id.* at APP035–APP037)

Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield (“Parents”),[1] all of whom have children eligible to participate in the Pilot Program, present one question for this Court’s immediate review:

I. Does the ESA Pilot Program violate the Home Rule Amendment?

[1] The chancery court also permitted an additional set of Intervenor-Defendants to intervene in the case and defend the ESA Pilot Program: Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. (“Greater Praise Christian Academy Intervenor-Defendants”). (Appendix, Exhibit 2, Agreed Order)



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## STATEMENT OF FACTS

The ESA Pilot Program is open to eligible students who are zoned to attend a school in any of the three designated local education agencies (LEAs) that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). An LEA is "any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

Plaintiffs are the Metropolitan Government of Nashville and Davidson County ("Metro"), Shelby County Government ("Shelby"), and Metropolitan Nashville Board of Public Education ("Metro Board"). Plaintiffs asserted in several counts that the ESA Pilot Program violated provisions of the Tennessee Constitution (the Home Rule Amendment, the Equal Protection Clause, and the Education Clause). (Appendix, Exhibit 1, Metro Compl., APP035–APP042)

The chancery court permitted Parents to intervene in the case to defend the constitutionality of the Pilot Program. (Appendix, Exhibit 2, Agreed Order) Without the ESA Pilot Program, Parents will be forced to re-enroll their children in their current assigned public schools where they face verbal and emotional abuse (Appendix, Exhibit 7, Bah Aff. in Supp. Mot. to Stay ¶¶ 7–8, ¶¶ 14–15, APP105–APP108; Davis Aff. in Supp. of Mot. to Stay ¶¶ 7–9, APP109–APP110), regularly encounter violence (Appendix, Exhibit 7, Brumfield Aff. in Supp. of Mot. to Stay ¶¶ 7–9, APP111–APP112), and where their academics will continue to



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suffer.[2] (Appendix, Exhibit7, Bah Aff. in Supp. of Mot. to Stay, ¶¶ 4–6, APP105–APP108; Diallo Aff. in Supp. of Mot. to Stay, ¶¶ 4–6, APP113–APP115)

Parents moved for judgment on the pleadings pursuant to Tennessee Rule of Civil Procedure 12.03. (Appendix, Exhibit 4, Mot. for J. on the Pleadings). Parents argued, *inter alia*, that the ESA Pilot Program did not violate the Home Rule Amendment. Plaintiffs filed a partial motion for summary judgment contending that the ESA Pilot Program violated the Home Rule Amendment as a matter of law. (Appendix, Exhibit 3, Pls.' Mot. for Summ. J.)

On May 4, 2020, the chancery court entered an Order in *Metro Government v. Tennessee Department of Education*, No. 20-0143-II, granting Plaintiffs' Motion for Summary Judgment on Count I of the Complaint (Appendix, Exhibit 5, Metro Mem. and Order, APP084) and denying Parents' Joint Motion for Judgment on the Pleadings as to Count I of the Complaint.[3] (*Id*. at APP086)

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[2] For example, Intervenor-Defendant Natu Bah's sons are assigned to A. Maceo Walker, where a mere 17.4% of students are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ.,https://reportcard.tnk12.gov/districts/792/schools/2740/page/SchoolAchievement.

[3] The chancery court's order also denied the State-Defendants' Motion to Dismiss Count I of the Complaint; denied Greater Praise Christian Academy Intervenor-Defendants' Motion to Dismiss Count I of the Complaint; and took the Defendants' arguments as to Plaintiffs' remaining claims under advisement pending appellate review of Plaintiffs' Home Rule claim. (Appendix, Exhibit 5, Metro Mem. and Order, APP085-APP086)



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The chancery court also granted, *sua sponte*, permission to appeal pursuant to Rule 9.[4] Specifically, the court found that "this is a matter appropriate for interlocutory and expedited appellate consideration. It is a matter of significant public interest that is extremely time sensitive . . . ." (Appendix, Exhibit 5, Metro Mem. and Order, APP086–APP087) Parents therefore file this application for interlocutory appeal and, in support of their application, state the following.

**ARGUMENT**

This Court should grant Parents permission to seek interlocutory review. Rule 9 governs interlocutory appeals. When ruling on applications for interlocutory review, appellate courts must consider the following factors:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and
>
> (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged

[4] Unless otherwise indicated, all references to Rules, *infra*, are to the Tennessee Rules of Appellate Procedure.



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order will not otherwise be reviewable upon entry of final judgment.

If permission to appeal is not granted, Parents will suffer an irreparable injury to the educational futures of their children. Further, a prompt resolution of the claims could result in less future litigation on an issue of utmost constitutional importance. Parents do not address the third prong because it is not relevant here.

**A. The Court should allow for an immediate interlocutory appeal to prevent Parents from suffering irreparable injuries.**

In evaluating an application for interlocutory review, Rule 9 provides that appellate courts should consider "the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective." Immediate interlocutory review is necessary in this case because if the chancery court's ruling is in error, injury to Parents is irreparable, severe, and cannot be corrected by a later appeal upon final judgment.[5] A later appeal would not be resolved in time to allow Parents to remove their children from failing schools in the upcoming school year.

The chancery court's injunction will undoubtedly result in an irreparable injury to Parents. Parents are low-income residents of the relevant LEAs, and their children attend some of the poorest performing

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[5] Parents have moved the chancery court, consistent with Rule 7(a), to stay its order pending action on this application for permission to appeal. (Appendix, Exhibit 7, Mot. to Stay)



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schools in Tennessee. The ESA Pilot Program was enacted so that people like Parents could have "additional educational options [aside from the] LEAs that have consistently and historically had the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a)(1). If their children are forced to stay in failing schools for another year because they cannot access the Pilot Program, they will not receive an education that meets their needs, endangering the bright future that they deserve.

For example, Parent Natu Bah's children attend A. Maceo Walker Middle School, where the academic environment has utterly "deteriorated." (Appendix, Exhibit 7, Bah Aff. in Supp. of Mot. to Stay ¶ 6, APP105–APP108) Her older son has been "repeatedly verbally and emotionally abused" and "told to go back to Africa where he came from." (*Id.* at ¶ 7) This bullying "is negatively affecting his learning environment, hurting his emotional well-being, and his ability to progress academically." (*Id.*) Her older son's academic progress has also been hindered as he sees the abuse inflicted on his brother. (*Id.* at ¶ 8)

These experiences are not limited to Natu Bah's children. At Macon-Hall Elementary, Builguissa Diallo has seen her daughter's reading ability regress since enrolling in the school. She now reads at a lower level than she did when she completed preschool. (Appendix, Exhibit 7, Diallo Aff. in Supp. of Mot. to Stay ¶ 6, APP113–APP115) Star-Mandolyn Brumfield fears sending her son back to an "unstable and overcrowded environment" where he "regularly encounters violence." (Appendix, Exhibit 7, Brumfield Aff. in Supp. of Mot. to Stay ¶ 8–9, APP111–APP112) The situation is so bad for her son that she dreads the prospect of sending him back to the public school and fears she will have



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no other option than to homeschool him. (*Id.* at ¶ 11) And if she homeschools him, then he will be forever ineligible for the ESA Pilot Program. (*Id.*) Bria Davis also sees the negative effects that poorly performing public schools have on her children. After being bullied at school, her daughter concluded that theft was the way to survive and began stealing others' lunches. (Appendix, Exhibit 7, Davis Aff. in Supp. of Mot. for Stay ¶ 9, APP109–APP110) Her son has become hostile toward learning and mimics bad behavior because he sees that it is tolerated by school officials. (*Id.* at ¶ 12)

For Parents and their children, another year trapped in a failing school is another year lost. It means another year of falling further behind academically. It means another year of enduring verbal abuse and being educated in an unstable atmosphere. It means another year of adopting bad habits and antisocial behavior that will threaten their futures. It means losing a year that they will never get back.

Interlocutory review would give Parents the chance to provide their children a better educational future *right now*. The potential injury to Parents and their children from the chancery court's order is substantial, severe, and cannot be adequately remedied. As the chancery court stated in its order, this is "a matter of significant public interest that is extremely time sensitive." (Appendix, Exhibit 5, Metro Mem. and Order, APP086) This Court should grant Parents' application for immediate interlocutory review.



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**B. Prompt resolution of the Home Rule claim could result in less future litigation on a legal issue of great public importance.**

The purpose of Rule 9 is to prevent "piecemeal litigation" that leads to endless litigation in the lower and appellate courts. *State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005). Accordingly, interlocutory review is denied when it would "(a) hinder the trial court's flexibility to revise its rulings depending on the evidence presented at trial or (b) result in another requested appeal should the trial court depart from the appellate court's decision based on the evidence presented at trial." *Id.*

Neither of those concerns is present here. Since the Home Rule claim was resolved on the merits at summary judgment, no additional evidence will be permitted or required as to that claim on remand. As a result, there is no danger of the case ping-ponging between the chancery and appellate courts on Plaintiffs' Home Rule claim.[6]

And because the Home Rule claim challenges the constitutionality of the ESA Program, it is particularly suited for interlocutory review. *Cf.* Tenn. Code Ann. § 16-3-201 (permitting expedited Supreme Court review in appeals presenting questions of unusual public importance that involve constitutional law). Given the constitutional nature of the Home Rule claim and the remote risk of "piecemeal litigation" on this issue, the application should be granted.

[6] A second case raising a challenge to the ESA Pilot Program under the Home Rule Amendment is also currently pending in the chancery court, but that case is effectively stayed pending appellate review in this case. (Appendix, Exhibit 6, *McEwen* Order)



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## CONCLUSION

Parents' application for interlocutory review should be granted. This case involves an issue of the utmost importance to Parents: the education of their children. The expeditious resolution of Plaintiffs' Home Rule claim will not only clarify an issue of great constitutional importance, but also provide needed guidance to Parents deciding the educational future of their children.



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DATED this 6th day of May, 2020.

Respectfully submitted,

**BEACON CENTER OF TENNESSEE**

/s/ Braden H. Boucek

Braden H. Boucek (BPR No. 021399)
P.O. Box 198646
Nashville, TN 37219
Tel: (615) 383-6431
Email: braden@beacontn.org

*Attorney for Bria Davis / Star Brumfieldh*

Jason I. Coleman (BPR No. 031434)
7808 Oakfield Grove
Brentwood, TN 37027
Tel: (615) 721-2555
Email: jicoleman84@gmail.com

*Local Counsel for Natu Bah / Builguissa Diallo*

**INSTITUTE FOR JUSTICE**

/s/ Arif Panju

Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Email: apanju@ij.org

David Hodges* (D.C. Bar No. 1025319)
Keith Neely* (D.C. Bar No. 888273735)
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Email: dhodges@ij.org
Email: kneely@ij.org

Tim Keller* (AZ Bar No. 019844)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Email: tkeller@ij.org

**Pro hac vice* motions to be filed
*Attorneys for Natu Bah / Builguissa Diallo*



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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2020, a true and exact copy of the foregoing was served via the court's electronic filing system and via electronic mail to:

Director Robert E. Cooper, Jr.
Lora Barkenbus Fox
Allison L. Bussell
Department of Law of the Metropolitan Government of Nashville and Davidson County
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
*Attorneys for Plaintiffs Metropolitan Government of Nashville and Davidson County and Metropolitan Nashville Board of Public Education*

Marlinee C. Iverson
E. Lee Whitwell
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, Tennessee 38103
*Attorneys for Plaintiff Shelby County Government*

Herbert H. Slattery III
Attorney General and Reporter

Andrée Sophia Blumstein
Solicitor General

Stephanie Bergmeyer
Jim Newsom
E. Ashley Carter
Assistant Attorneys General
Office of the Tennessee
Attorney General



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P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-6828
Stephanie.Bergmeyer@ag.tn.gov

Brian K. Kelsey
Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 S. LaSallee Street, Suite 1500
Chicago, Illinois 60603
*Counsel for Intervenor-Defendants Greater Praise Christian Academy, Seasonal Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.*

/s/ Braden H. Boucek
Braden H. Boucek



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